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No. 02-297

IN THE
Supreme Court of the United States

SHANNON T. DOYLE,
Petitioner,
v.
HYDRO NUCLEAR SERVICES,
Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF LINDA TRIPP, *et al.* IN SUPPORT OF PETITIONER SHANNON DOYLE

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR GRANT OF A WRIT OF CERTIORARI

Counsel comes before this Honorable Court pursuant to Rule 37 of the Rules of the Supreme Court of the United States of America.

Counsel for Amici respectfully requests this Honorable Court to grant Amici consent to file an Amicus Curiae brief in support of petition for grant of certiorari in the case of *Shannon T. Doyle v. Hydro Nuclear Services*, No. 02-297.

Counsel has sought consent from each of the parties to the case. Counsel has obtained consent to file an Amicus Curiae brief from two of the parties, viz. Shannon T. Doyle and the Solicitor-General of the United States. Letters of Consent from these two parties have been lodged with the Clerk of the Court.

Counsel has been refused consent by Hydro Nuclear Services, Respondent in *Shannon T. Doyle v. Hydro Nuclear Services*. Respondent gave no reason for its decision.

The amici in this case, Ms. Tripp, Dr. Frederic Whitehurst and Ms. Adrienne Anderson have all experienced adverse actions as the result of their whistleblowing activity. These individuals are very concerned that the *Doyle* decision will, if allowed to stand, will add to the immense discouragement that whistleblowers already suffer. Having braved an arsenal of employer retaliation, Ms. Tripp, Dr. Whitehurst and Ms. Anderson are all too aware of the threat to the public interest posed by the Third Circuit's decision in *Doyle v. Hydro Nuclear Services*.

For these reasons, counsel respectfully requests that he be permitted to file the attached Amicus Curiae brief on behalf of Ms. Linda Tripp, Dr. Frederic Whitehurst and Ms. Adrienne Anderson.

Respectfully submitted

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

As whistleblowers of some public standing, amici, Ms. Linda Tripp and Dr. Frederic Whitehurst are well positioned to speak from experience concerning the intimidating nature on whistleblowers that the Third Circuit's decision in *Doyle v. Hydro Nuclear Services* will have if allowed to stand. Ms. Adrienne Anderson undertook activities protected by the ERA and suffered the full force and fury of adverse actions by her employer, including a campaign of vituperative personal criticism. If she had signed the type of waiver required of Mr. Doyle by Hydro Nuclear Services, her willingness to expose the injurious conduct of her employer would have been greatly weakened.

In each case, these individuals have experienced harassment, retaliation and employment discrimination as a result of exposing instances of employer misconduct harmful to the public good.

It is difficult to exaggerate how vital avenues of legal redress are to those courageous employee-whistleblowers, both actual and potential, who put the safety, integrity and health of the commonweal before their own careers. Protecting the future employment and careers of these individuals is an essential component in encouraging employees to reveal severe abuses of power and dangerous institutional practices gravely prejudicial to the public good.

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[1] Pursuant to S.Ct. Rule 37.6, Amici state that counsel for a party did not author the brief in whole or in part and that no one other than Amici, their members or their counsel have made any monetary contribution to the preparation or submission of this Brief.

Had the *Doyle* decision had been the law of the land at the time and the waiver requirement part of their respective employment contracts, it is doubtful whether the nefarious activities revealed by Ms. Tripp, Dr. Whitehurst and Ms. Anderson would have come to light. It is surely an incontrovertible fact that, even under the best of circumstances, whistleblowers run enormous career risks.

If employers are able, as the *Doyle* decision now teaches, to require prospective employees to waive an employer's liability for adverse action taken on the basis of an applicant's previous whistleblowing activity, then whistleblowers face even greater disincentives to expose employer misconduct.

ARGUMENT

The very reason for the creation of whistleblower protection provisions both at the state and federal level, is that conscientious employees should not have to choose between keeping their jobs and their moral and legal obligation to report actual or probable violations of law by their employers. This is, however, the choice that will effectively be thrust upon many such employees if employers are allowed to insist on their employees signing waivers such as the one at issue in Mr. Doyle's suit. The waiver in Mr. Doyle's case releases his employer and any other employer from whom his employer obtained information about him from any claim that this information had been provided or used to deny Mr. Doyle employment because of his whistleblower activities. Should employers be allowed to require their employees to sign such waivers, the right of employees to file a complaint of illegal blacklisting could be eliminated. This would completely discourage employee-whistleblowers from even seeking a position with employers who used waivers like the one at issue in Mr. Doyle's case. Furthermore, the use of such waivers in employment contracts would undoubtedly have a chilling effect on any would be whistleblowers. This runs counter to the policies underlying all whistleblower protections, not just those provided by Section 210 of the Energy Reorganization Act. Therefore, the Court should grant Shannon Doyle's Petition for a Writ of Certiorari and review the decision of the Unites States Court of Appeals for the Third Circuit.

Frequently the efforts of employee-whistleblowers to expose an employers wrong doing are rewarded by vicious and discriminatory responses by the employer. Congress recognized the need to protect employee-whistleblowers from this sort of discrimination when it amended the Safe

Drinking Water Act (SDWA), the Clean Air Act (CAA), the Energy Reorganization Act (ERA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Toxic Substance Control Act (TSCA), the Solid Waste Disposal Act ((SWDA), also known as the Resource Conservation and Recovery Act, (RCRA)), and the Water Pollution Control Act (WPCA). *See* Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(I) (1994); Clean Air Act (CAA), 42 U.S.C. §7622 (1994); Energy Reorganization Act (ERA), 42 U.S.C.§ 5851 (1994); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (1994); Solid Waste Disposal Act (SWDA), 42 U.S.C .§ 6971 (1994); Water Pollution Control Act (WPCA), 33 U.S.C.§1367 (1994). Many states have also recognized the need to protect public and private whistleblowers from such discrimination. *See generally* Robert Vaughn, State Whistleblower Statutes and the Future of Whistleblower Protection, 51 *Admin L. Rev.* 581 (1999).

A glance at the disgraceful treatment of the Amici, in response to their protected activities, reveals the harsh nature of the discrimination faced by many employee-whistleblowers. Frederic Whitehurst, whose story was told in *Tainting Evidence: Inside the Scandals at the FBI Crime Lab* (New York: The Free Press, 1998), was subjected to a campaign of harassment and degradation in response to his attempts to report a pattern of wrongdoing in the FBI crime lab. Dr. Whitehurst pursued his complaints internally for more than three years, and, only after seeing no result, did Dr. Whitehurst turn to the outside. In response, the FBI and the Office of Investigator General claimed that Dr. Whitehurst was unfit for FBI work, because he recklessly reported wrongdoing. In reality, Dr. Whitehurst was merely acting in accordance with his duty to follow FBI regulations,

which demand that each FBI employee report *any* possibility of any wrongdoing.

Similarly, Ms. Linda Tripp has also been subjected to a campaign of discrimination and harassment in response to her efforts to report wrongdoing in the Whitehouse. In retaliation for Ms. Tripp's having provided evidence to the Office of Independent Counsel, which eventually resulted in the impeachment of President Clinton, the Defense Department leaked information from government files to discredit and malign her. As a result of this, Ms. Tripp, whose work performance was consistently rated as outstanding, has faced severe difficulties in obtaining employment, even at a lower grade and salary.

Ms. Anderson faced severe harassment and discrimination from her employer, the Metro Wastewater Reclamation District (A Metro) in Colorado, for expressing serious concerns of Metro workers to other members of the Board of Directors for Metro. Metro repeatedly attacked Ms. Anderson's credibility through the media, damaging her professional reputation, and her ability to obtain future employment. In finding for Ms. Anderson in her whistleblower claim against Metro, the Administrative Law Judge noted that the hardship imposed on Ms. Anderson by Metros attacks was evidenced not only by the fact that she was not reappointed to the Board of Directors for Metro, but also by the fact that she had since been unable to obtain a full time position at the University of Colorado, where she had been teaching part time. *See Anderson v. Metro Wastewater Reclamation District*, 1997-SDW-7, at 32-33 (Dept of Labor Sept., 1997).

Regrettably, far too many whistleblowers and would be-whistleblowers are subjected to similar treatment by their

employers. If employers are permitted to make waivers like the one at issue in Mr. Doyle's case a precondition of employment, then many of these whistleblowers could be forced to forfeit their rights to be free from illegal blacklisting in order to obtain employment. This would have a substantial chilling effect on the protected activity of whistleblowers. An employee whose conscience demands that he or she report an employers wrong doing, might be sorely tempted not to come forward with information because of fears that he or she might be blacklisted and have no available remedy.

Whistleblowers seeking jobs would almost assuredly be discouraged from seeking employment with any company or agency that required them to sign a release that might prevent them from pursuing a valid claim for illegal blacklisting. Judge Bright, in his dissenting opinion in *Doyle v. U.S. Secretary of Labor*, 285 F.3d 243, 255 (3d Cir. 2002) (Bright *dissenting*), noted that it was quite probable that any layperson would have understood the release that Mr. Doyle was asked to sign to mean that he or she would release former employers as well as putative employers from liability for any harm caused by releasing information about the employee. Although the Third Circuit noted, in its analysis, that as interpreted by Mr. Doyle, the release would have been unenforceable (*Doyle*, 285 F.3d at 252); this is small comfort to whistleblowers like Mr. Doyle, who lack the legal training to know that the waiver could not be used by the employer as a defense to a retaliation claim. Furthermore, it would be absolutely repugnant to many whistleblowers, who above all else prize the integrity of their word, to use a technicality in the language of the waiver to attempt to get around a promise they believed they were making to release former as well as putative employers from any liability for any harm caused by releasing information about the employee. These reasons

support the views adopted by both the Secretary of Labor and Judge Bright: that employees must not be compelled to sign what they believe to be a waiver of past and future ERA claims as a condition of employment. *Doyle*, 285 F.3d at 254-55 (Bright *dissenting*).

Waivers such as the one at issue in Mr. Doyle's case, in so far as they discourage employee-whistleblowers from ever applying for jobs with the companies or agencies that use them, could further chill any disclosures of employer wrongdoing by would be whistleblowers. The Administrative Law Judge in *Hobby v. Georgia Power Company*, 1990-ERA-30, at 7 (Dept of Labor Feb., 2001) noted that one reason why reinstatement is an important remedy in many whistleblower actions is that, a return of a discharged employee to the job site provides concrete evidence to other employees that the legal protections of the whistleblower statutes are real and effective. Similarly, if employee-whistleblowers are discouraged from even applying for positions where they might be required to sign waivers such as the one at issue in Mr. Doyle's case, then other employees might well begin to doubt whether the legal protections of the whistleblower statutes are Areal and effective. This could lead to a significant chilling effect on ay potential disclosure of employer wrongdoing by whistleblowers.

CONCLUSION

For the reasons set forth above, the Court should grant Shannon Doyle's Petition for a Writ of Certiorari and review the decision of the Unites States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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